Not To Be Published:

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN MARIANA ISLANDS

UNITED STATES OF AMERICA, Plaintiff, vs. ROQUE S. NORITA and JULITA A. SABLAN, Defendants.	Criminal Case No. 09-00026 **MEMORANDUM OPINION AND ORDER REGARDING THE PROSECUTION'S MOTIONS IN LIMINE** ***FILED UNDER SEAL***

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In this criminal case, involving charges of trafficking in methamphetamine against both defendants and a gun charge against one defendant, the prosecution has filed motions in limine to exclude various categories of evidence. The defendants resist most of these motions.

I. INTRODUCTION

A. The Indictment

In a Second Superseding Indictment (docket no. 81), handed down February 25, 2010, defendants Roque S. Norita and Julita A. Sablan were charged with the following offenses:

Count 1 charges that, from a date unknown, but on or about August of 2008, and continuing through about July 28, 2009, defendants Norita and Sablan conspired, with each other and with others known and unknown to the Grand Jury, to distribute methamphetamine and to possess methamphetamine, that is, methamphetamine hydrochloride and d-methamphetamine hydrochloride ("ice"), with intent to distribute it, all in violation of 21 U.S.C. §§ 846, 841(a)(1) and 841(b)(1)(C), and 18 U.S.C. § 2;

Count 2 charges that, on or about February 19, 2009, defendants Norita and Sablan knowingly and intentionally possessed 0.050 net grams of methamphetamine hydrochloride, with intent to distribute it, and, at the time, defendant Norita was within

1,000 feet of a school, namely the Gregorio T. Camacho Elementary School in San Roque Village, all in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C), 860(a) and (b), 18 U.S.C. § 2, and *Pinkerton v. United States*, 328 U.S. 640 (1946);

Count 3 charges that, on or about February 19, 2009, defendants Norita and Sablan knowingly and intentionally possessed 0.062 net grams of methamphetamine hydrochloride, with intent to distribute it, and, at the time, defendant Norita was on premises on which an individual under the age of 18 years resided, all in violation of 21 U.S.C. §§ 860a, 18 U.S.C. § 2, and *Pinkerton v. United States*, 328 U.S. 640 (1946);

Count 4 charges that, on or about February 25, 2009, defendant Sablan knowingly and intentionally possessed 1.1 actual grams of d-methamphetamine hydrochloride ("ice"), with intent to distribute it, and, at the time, defendant Sablan was within 1,000 feet of a school, namely Tanapag Elementary School, and was also on premises on which an individual under the age of 18 years resided, all in violation of 21 U.S.C. §§ 860(a) and (b), 860a, and 841 (b)(1)(C);

Count 5 charges that, on or about July 27, 2009, defendant Sablan knowingly and intentionally possessed 0.11 actual grams of d-methamphetamine hydrochloride ("ice"), with intent to distribute it, and, at the time, defendant Sablan was at Candi Poker in Tanapag Village, within 1,000 feet of a school, namely Tanapag Elementary School, all in violation of 21 U.S.C. §§ 860(a) and (b), and 841 (b)(1)(C);

Count 6 charges that, on or about July 28, 2009, defendant Sablan knowingly and intentionally possessed 0.070 net grams of methamphetamine hydrochloride, with intent to distribute it, at Banana Beach in Tanapag Village, all in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C);

and **Count 7** charges that, on or about March or April of 2009, defendant Norita, during and in relation to a drug-trafficking crime, knowingly used a firearm, namely a

.223 caliber Armalite Model M15A2 rifle, serial number US48714, by trading it for methamphetamine, all in violation of 18 U.S.C. § 924(c)(1)(A).

These charges against Norita and Sablan are set for a jury trial before the undersigned, as a visiting judge, beginning on April 12, 2010.

B. The Prosecution's Motions In Limine

After a telephonic status conference on March 3, 2010, *see* Hearing Minutes (docket no. 85), the court entered a Scheduling And Trial Management Order For Jury Trial (docket no. 86) on March 4, 2010, that, *inter alia*, set a deadline of March 25, 2010, for any motions in limine by the prosecution. On March 25, 2010, the prosecution did, indeed, file the following four motions in limine: (1) a Motion *In Limine* To Exclude Argument Or Questions re: Drug Addiction (docket no. 111); (2) a Motion *In Limine* To Preclude Any Mention Of Penalty (docket no. 112); (3) a Motion *In Limine* To Exclude Argument Or Objection re: Recorded Statements (docket no. 113); and (4) a Motion *In Limine* To Exclude Prior Criminal Histories Of Confidential Informants (docket no. 115).

Defendant Sablan filed a Response (docket no. 121) to the prosecution's motions in limine on March 29, 2010, resisting all but the first such motion. Defendant Norita provided the court with a timely courtesy copy of his Response by e-mail on April 5, 2010, although, owing to slowness of the electronic docketing system, that Response was not filed until April 6, 2010 (docket no. 148).

By Order (docket no. 127), dated March 30, 2010, the court set the prosecution's Motion *In Limine* To Exclude Argument Or Objection re: Recorded Statements (docket no. 113) for hearing at the pretrial conference. Therefore, this ruling does not address that motion, but does address the prosecution's other three motions.

II. LEGAL ANALYSIS

A. Rule 104

As a preliminary matter, the court notes that Rule 104 of the Federal Rules of Evidence provides, generally, that "[p]reliminary questions concerning . . . the admissibility of evidence shall be determined by the court. . . ." FED. R. EVID. 104. Such preliminary questions may depend upon such things as whether the factual conditions or legal standards for the admission of certain evidence have been met. *See id.*, Advisory Committee Notes, 1972 Proposed Rule. This rule, like the other rules of evidence, must be "construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that truth may be ascertained and proceedings justly determined." FED. R. EVID. 102. The court concludes that preliminary determination of the admissibility of the evidence put at issue in the prosecution's evidentiary motion, to the extent that the admissibility of such evidence can be determined from the parties' submissions, will likely serve the ends of a fair and expeditious presentation of issues to the jury. Therefore, the court turns to consideration of the prosecution's pretrial evidentiary motions in turn.

B. Evidence Of Drug Addiction

In the first of its motions in limine, the Motion *In Limine* To Exclude Argument Or Questions re: Drug Addiction (docket no. 111), the prosecution seeks to exclude any argument, testimony, or questions by the defendants designed to elicit testimony with respect to either defendant's addiction to drugs.

1. Arguments of the parties

The prosecution asserts that drug addiction is not a defense to a criminal charge, as drug addiction, no matter how severe, does not amount to involuntary intoxication. Thus,

the prosecution asserts that allowing the defendants to argue or examine witnesses concerning either defendant's addiction to drugs can only be intended as the basis for an impermissible nullification verdict, that is, an attempt to get the jurors to decide the case based on sympathy for a defendant, not a verdict based on the evidence presented and the law as instructed.

In her Response (docket no. 121), defendant Sablan states that she is not asserting a drug addiction defense and asserts that she has tested negative for methamphetamine in a test performed by the United States Probation Office. Defendant Norita's response is that he is not asserting a defense of addiction.

2. Analysis

a. Relevance and prejudice rules

The prosecution's motion to exclude evidence of the defendants' drug addiction, if any, is premised on the asserted lack of relevance and possible prejudicial effect of such evidence. Rule 401 of the Federal Rules of Evidence defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 402 provides that relevant evidence is generally admissible, but irrelevant evidence is not. Rule 403 provides for exclusion of even relevant evidence on various grounds, as follows:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

FED. R. EVID. 403. The Advisory Committee Notes to Rule 403 explain that "undue prejudice" means "an undue tendency to suggest decision on an improper basis," and that

a decision on an "improper basis" is "commonly, though not necessarily, an emotional one." FED. R. EVID. 403, Advisory Committee Notes. Rule 404(b) of the Federal Rules of Evidence prohibits admission of prior convictions and "bad acts" simply "to prove the character of a person in order to show action in conformity therewith," but does permit such evidence to be admitted for "other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." FED. R. EVID. 404(b). The Ninth Circuit Court of Appeals has recognized that evidence otherwise admissible pursuant to Rule 404(b) is still subject to the balancing of probative value against prejudicial effect otherwise required by Rule 403. *See, e.g., United States v. Cherer*, 513 F.3d 1150, 1157 ("If evidence satisfies Rule 404(b), 'the court must then decide whether the probative value is substantially outweighed by the prejudicial impact under Rule 403." (quoting *United States v. Romero*, 282 F.3d 683, 688 (9th Cir. 2002)); *United States v. Holler*, 411 F.3d 1061, 1067 (9th Cir. 2005); *United States v. Curtin*, 489 F.3d 935, 943 (9th Cir. 2007) (*en banc*).

b. Admissibility of addiction evidence

As to the relevance or probative value of evidence of the defendants' drug addiction, if any is offered by the defendants, the prosecution is correct that the Ninth Circuit Court of Appeals has recognized that drug addiction is not sufficient to invoke an insanity defense under the Insanity Defense Reform Act of 1984, 18 U.S.C. § 17, *see United States v. Knott*, 894 F.2d 1119, 1122-23 (9th Cir. 1990), and that "[v]oluntary intoxication is no defense to [a specific intent] crime," *United States v. Burnim*, 576 F.2d 236, 237 (9th Cir. 1978). The defendants have both stated that they do not intend to assert addiction defenses, however, so that they do not assert that any evidence of addiction is relevant to an insanity or mental state defense. In these circumstances, the prosecution's motion will be denied as moot.

The court notes, however, that evidence of addiction may be relevant and admissible for reasons other than to support an insanity or mental state defense. Both case law and common sense suggest that a defendant may present evidence of addiction to explain his or her presence during drug transactions or to explain his or her association with members of a drug conspiracy to challenge his or her participation in the conspiracy. *See, e.g., United States v. McChristian*, 47 F.3d 1499, 1505 (9th Cir. 1995) (the defendant asserted that his entire defense was based on the argument that he was present at drug transactions only because he was a drug dependent addict "hoping for some scraps of drugs to fall from the conspirator's drug table" and not as a participant in the conspiracy, and the court held that the prosecution's questions to the defendant's expert on addiction about whether addicts could participate in a drug conspiracy were proper to address that defense); *United States v. Martin*, 599 F.2d 880, 888-89 (9th Cir.) (a drug addict cannot be convicted of conspiracy based on his relationship with his supplier), *cert. denied*, 441 U.S. 962 (1979); *see also United States v. Hester*, 140 F.3d 753, 757-58 (8th Cir. 1998) (considering whether a "mere presence" instruction was adequate to cover the substance of the defendant's defense that his mere presence and actions as an addict, even if they may have been consistent with some purpose of the charged drug conspiracy, did not necessarily indicate that he was a member of the conspiracy); *United States v. Green*, 40 F.3d 1167, 1174 (11th Cir. 1994) (intent was a material issue in the case, where the defendant pleaded not guilty to a drug conspiracy charge and presented extensive evidence of his addiction to cocaine to explain his presence at a residence during the time of the conspiracy). Thus, the prosecution's theory that evidence of a defendant's addiction can only be intended as the basis for an impermissible nullification verdict, that is, an attempt to get the jurors to decide the case based on sympathy for a defendant, not a verdict based on the evidence

presented and the law as instructed, simply ignores other plausible and permissible purposes for which such evidence could be admissible.[1]

If offered by the defense for such a permissible purpose, such evidence is unlikely to be unfairly prejudicial, within the meaning of Rule 403. First, where addiction evidence is offered for a proper purpose, such as to explain a defendant's mere presence where drug transactions were occurring, the risk that jurors would consider that evidence for an improper purpose, such as an unasserted mental state or insanity defense or to "nullify" other evidence, seems remote. In any event, if any addiction evidence is offered for a proper purpose, and a limiting instruction explaining the proper purpose for which such evidence might be offered is requested and found necessary by the court, such an instruction would be adequate to mitigate the potential prejudice. *See, e.g., United States*

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[1]Evidence of drug addiction may be relevant to the court's determination of drug quantity involved in the charged offenses, for purposes of sentencing, where evidence of addiction makes it plausible that some of the drugs were possessed for personal use, rather than for distribution. *See, e.g., United States v. Gonzales*, 307 F.3d 906, 912-14 (9th Cir. 2002). It would follow that, where drug quantity is at issue to determine a statutory maximum sentence or sentencing range, evidence of drug addiction might also be relevant to a *jury's* determination of the quantity of drugs possessed for personal use, rather than for distribution.

Also, evidence of addiction may be admissible against a defendant as a proper basis to impeach a testifying defendant or other witness as to credibility, *see Singh v. Prunty*, 142 F.3d 1157, 1164 (9th Cir. 1998) (citing *People of the Territory of Quam v. Dela Rosa*, 644 F.2d 1257, 1259-61 (9th Cir. 1980)); *United States v. Vgeri*, 51 F.3d 876, 881 (9th Cir. 1995) (discussing when an "addict" instruction is appropriate for a witness), but the prosecution apparently eschews any such use of evidence that a defendant was addicted to drugs here by moving to exclude all evidence of a defendant's addiction. Similarly, evidence of drug addiction may also be admissible against a defendant to establish a defendant's motive, particularly a financial motive, to commit crimes, *see United States v. Labansat*, 94 F.3d 527, 530-31 (9th Cir. 1996), but the prosecution likewise apparently eschews any such use of evidence that a defendant was addicted to drugs here.

v. Cherer, 513 F.3d 1150, 1159 (9th Cir. 2008) (where the court reduces the risk of unfair prejudice by giving a limiting instruction, the risk of prejudice is less likely to substantially outweigh the probative value of the evidence); *United States v. Hollis*, 490 F.3d 1149,1153 (9th Cir. 2007).

However, it is up to the defendants, to decide whether or not they will attempt to offer addiction evidence for a permissible purpose outside the scope of the prosecution's motion in limine.

Because neither defendant intends to offer an addiction defense, the prosecution's motion to exclude evidence of the defendants' addiction will be denied as moot.

C. Evidence Of Penalties

The prosecution's second motion in limine now before the court is its Motion *In Limine* To Preclude Any Mention Of Penalty (docket no. 112). More specifically, the prosecution seeks an order prohibiting the defendants from making any comment or argument, presenting any evidence or testimony, or asking any question designed to elicit testimony concerning the penalty resulting from a conviction in this case.

1. Arguments of the parties

The prosecution asserts that the defendants' punishment, in the event that they are convicted, is not for the jury to decide and is not a proper matter for the jury's consideration in rendering a verdict. The prosecution cites in support of this motion Ninth Circuit Model Criminal Jury Instruction 7.4.

Defendant Sablan acknowledges that it is inappropriate for jurors to consider or to be informed of the consequences of their verdict, and that the Ninth Circuit Court of Appeals has recognized that jurors could infer the potential sentence faced by a defendant from admission of testimony regarding a collaborating witness's potential sentence and that

such information could have some influence on the jury's deliberative process. Nevertheless, defendant Sablan contends that, in such circumstances, the prosecution's interest in excluding information about a defendant's potential punishment yields to and is outweighed by a defendant's constitutional right to probe the possible biases, prejudices, or ulterior motives of a cooperating witness. She cites in support of her contentions *United States v. Larson*, 495 F.3d 1094, 1105 (9th Cir. 2007) (*en banc*). Defendant Norita joins in defendant Sablan's response to this motion.

2. Analysis

The prosecution is correct that Ninth Circuit Criminal Jury Instruction No. 7.4 states,

> The punishment provided by law for this crime is for the court to decide. You may not consider punishment in deciding whether the government has proved its case against the defendant beyond a reasonable doubt.

The court has indicated that it intends to give this instruction, with no more than editorial modifications, by including it in the court's Proposed Jury Instructions. Thus, the court agrees with the prosecution's premise that the potential punishment faced *by the defendants* is not relevant to any issue in this case. *See* FED. R. EVID. 402 (irrelevant evidence is not admissible).

The prosecution's motion, which seeks to preclude any question designed to elicit testimony concerning the penalty "resulting from a conviction in this case," Motion *In Limine* To Preclude Any Mention Of Penalty (docket no. 112), could be construed to request a broader exclusion of any question about a *witness's* potential punishment from participation in the crimes charged against the defendants. This is true, even though only two defendants, Norita and Sablan, have ever been charged in this particular case, Criminal No. 09-00026, that is not to say that other defendants have not been charged in

other "cases" with offenses arising from the same nucleus of operative facts, and because jurors, in particular, are not likely to make a distinction between being charged in this case and being involved in the crimes charged in this case.

It does not follow from the general prohibition on consideration of a defendant's potential punishment that all questions from which jurors might be able to *infer* something about the potential punishment faced by a defendant must be excluded. In *Larson*, on which defendant Sablan relies, the Ninth Circuit Court of Appeals held that the district court had improperly restricted the defendant's cross-examination of cooperating witnesses about the sentences they faced, including mandatory minimum sentences in the absence of substantial assistance motions from the prosecution. *Larson*, 495 F.3d at 1104-05. The appellate court rejected the district court's rationale for its ruling, "that 'all matters relating to sentencing are the decision of the court and the court only,'" because it was inaccurate: The prosecution had the discretion to control the cooperating witnesses' potential sentences by making motions for reductions in the cooperating witnesses' sentences for substantial assistance, relieving them of what might otherwise be mandatory minimum life sentences for the offenses to which they pleaded guilty. *Id.* In addition, the appellate court observed,

> We recognize, however, the risk that a jury could infer the potential sentence faced by a defendant from the admission of testimony regarding a witness' mandatory minimum sentence, and that such information could have some influence on the jury's deliberative process. *See United States v. Frank,* 956 F.2d 872, 879 (9th Cir. 1991) ("It has long been the law that it is inappropriate for a jury to consider or be informed of the consequences of their verdict."). Here, there was added risk because Lamere and Poitra were part of the same conspiracy to distribute methamphetamine as Defendants. *Cf. United States v. Alvarez,* 987 F.2d 77, 82 (1st Cir. 1993)

> (recognizing the concern that "such testimony might mislead or confuse the jury; particularly where, as here, the witness sought to testify to the same penalties faced by the defendants"). However, while the Government has an interest in preventing a jury from inferring a defendant's potential sentence, any such interest is outweighed by a defendant's right to explore the bias of a cooperating witness who is facing a mandatory life sentence. *See United States v. Chandler,* 326 F.3d 210, 223 (3d Cir. 2003) ("[W]hile the government had a valid interest in keeping from the jury information from which it might infer [the defendant's] prospective sentence were she to be convicted, that interest . . . had to yield to [the defendant's] constitutional right to probe the possible biases, prejudices, or ulterior motives of the witnesses against her.") (internal quotation marks omitted).

Larson, 495 F.3d at 1105 (footnote omitted). Thus, *Larson* stands for the proposition that the district court cannot exclude cross-examination of *cooperating witnesses* concerning their potential sentences on the ground that sentencing is a matter for the court *or* on the ground that such cross-examination may allow the jurors to infer what a defendant's potential sentence might be.

Because the parties have requested or have not objected to jury instructions concerning witnesses who claim to have participated in the crimes charged against the defendants, it appears likely that there will be testimony from cooperating witnesses that they were part of the same drug conspiracy as the defendants or participated in other crimes for which only defendants Sablan and Norita have been charged in this case. This circumstance is similar to the situation in *Larson*. Thus, to the extent that the prosecution's request to exclude any question designed to elicit testimony concerning the penalty "resulting from a conviction in this case," Motion *In Limine* To Preclude Any Mention Of Penalty (docket no. 112), could be construed to request exclusion of any

question about a *witness's* potential punishment, from participation in the crimes charged against the defendants, as well as any questions about a defendant's potential punishment, such an exclusion cannot be granted, because of the defendant's interest in exploring the potential bias of a cooperating witness. *Larson*, 495 F.3d at 1105.

Therefore, the prosecution's Motion *In Limine* To Preclude Any Mention Of Penalty (docket no. 112) will be granted to the extent that the court will exclude any comment or argument, evidence or testimony, or question designed to elicit testimony concerning the penalty resulting from a conviction of *the defendants* in this case, but the defendants are free to question any *witness* about the potential penalties that witness may face for participating in crimes charged against the defendants or for any other offenses, in the absence of a substantial assistance motion from the prosecution.

D. Evidence Of Informants' Criminal Histories

The last motion that the court will consider in this ruling is the prosecution's Motion *In Limine* To Exclude Prior Criminal Histories Of Confidential Informants (docket no. 115). In this motion, the prosecution seeks to exclude the prior criminal histories, apparently in their entireties, of the confidential sources used in the investigation that led to the Indictment in this case. The prosecution identifies, however, only one conviction for each of two confidential sources. For the confidential source who dealt with defendant Norita, the prosecution identifies a charge in 2000 for kidnaping and attempted rape, pleaded down to a conviction in 2001 for attempted oral copulation, for which the confidential source was sentenced to five years in jail, with all but one year suspended. For the confidential source who dealt with defendant Sablan, the prosecution identifies only a charge in 2006 of theft and conspiracy to commit theft, but which apparently resulted in a pretrial diversion, with no record of conviction. Both defendants oppose this motion.

1. Arguments of the parties

The prosecution argues that the conviction of the confidential source against defendant Norita should be excluded pursuant to Rule 403 of the Federal Rules of Evidence as more prejudicial than probative. The prosecution contends that evidence of the arrest, without a conviction, of the confidential source against defendant Sablan cannot be used to impeach a witness. The prosecution also argues that, under Rule 608(b) of the Federal Rules of Evidence, specific acts of misconduct cannot be inquired into unless they are probative of truthfulness or untruthfulness, but neither the conviction nor the arrest at issue here is probative of truthfulness or untruthfulness. Consequently, the prosecution requests that the court exclude the prior criminal histories of the confidential sources in this case and order counsel not to attempt to cross-examine the prosecution's witnesses about prior arrests that did not result in convictions, nor to attempt to cross-examine any witness about misconduct that did not result in charges or arrest, unless it is related to the conduct of the witness in this case or probative of truthfulness or untruthfulness.

Defendant Sablan points out that the prosecution has not fully disclosed the confidential informants' criminal histories, as required by prior orders, so that her ability to respond to this motion in limine is crippled. The court finds that this purported deficiency has been remedied, because the court has determined that the prosecution has now produced all of the information concerning confidential informants that it was required to produce. Nevertheless, defendant Sablan also argues that the limitations that the prosecution seeks will improperly impede her ability to present a complete defense and to confront and effectively cross-examine witnesses against her. She also asserts that the rules of evidence cannot be used to prevent her from exploring potential bias of the witnesses against her. She argues that the credibility of the prosecution's witnesses is

crucial to her defense and confrontation rights, where she denies being involved in any conspiracy or drug transaction charged in the Second Superseding Indictment.

Defendant Sablan also argues that the prosecution has not established that either Rule 404(b) or Rule 608(b) supports the exclusions it seeks. Defendant Sablan argues that evidence of other crimes, wrongs, or acts of the confidential sources may be relevant and admissible pursuant to Rule 404(b) to show motive, opportunity, and so on, to fabricate charges against defendant Sablan or to falsely accuse her of criminal conduct. She argues that the prosecution has not established that unproduced convictions and arrests of its confidential sources cannot be utilized for an admissible purpose under Rule 404(b) or that such evidence is otherwise excludable under Rule 403. She also argues that Rule 608(b) should not be read to bar admission of evidence introduced to contradict or disprove a witness's testimony as to a material issue in the case, as opposed to precluding extrinsic evidence that has no relevance other than impeachment by prior misconduct.

Defendant Norita joins in, adopts, and incorporates by reference defendant Sablan's arguments concerning this motion in limine.

2. Analysis

a. Applicable principles

The court notes that, since the filing of the motions in limine, the court has determined that the prosecution has produced all of the information concerning the confidential informants that it was required to produce. The court also recognizes that the intended scope of the prosecution's motion to exclude criminal histories of the confidential informants may have been to encompass everything in the confidential sources' criminal histories. The court finds, however, that the prosecution's motion provides an adequate basis for the court to consider *only* the admissibility of the 2001 sex offense conviction

against the confidential source involved with defendant Norita and the 2006 theft charge against the confidential source involved with defendant Sablan.

Although Sablan asserts that the rules of evidence cannot be used to abridge her right to confrontation and to present a defense, the court believes that she has misconstrued the extent to which the court can rely on the rules of evidence to exclude evidence or limit inquiries. First, in *United States v. Larson*, 495 F.3d 1094 (9th Cir. 2007) (*en banc*), on which defendant Sablan relies, the court reiterated that "'[t]he constitutional right to cross-examination is "[s]ubject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation."'" *Larson*, 495 F.3d at 1102 (quoting *United States v. Schoneberg*, 396 F.3d 1036, 1042 (9th Cir. 2005), in turn quoting *Davis v. Alaska*, 415 U.S. 308, 318 (1974)). The court stated that the limitation on the right to cross-examine "'cannot preclude a defendant from asking, not only "*whether* [the witness] was biased" but also "to make a record from which to argue *why* [the witness] might have been biased."'" *Id.* (again quoting *Schonebreg*, 396 F.3d at 1042, in turn quoting *Davis*, 415 U.S. at 318). Thus, while the court cannot prevent a defendant from asking whether a witness was biased or from making a record from which to argue why the witness might have been biased, nothing in *Larson* says that the court cannot rely on the Rules of Evidence to limit or exclude evidence. Similarly, in *Chia v. Cambra*, 360 F.3d 997 (9th Cir. 2004), on which defendant Sablan also relies, the court expressly acknowledged that the competing interests of a criminal defendant in presenting a complete defense and the prosecution in excluding improper or prejudicial evidence requires the court to balance those interests, on the one hand, to "afford 'due weight to the substantial state interest in preserving orderly trials, in judicial efficiency, and in excluding unreliable . . . evidence," and, on the other hand, "stand vigilant guard over the principle that '[t]he right to present a defense is fundamental' in our system of constitutional jurisprudence." *Chia*, 360 F.3d

at 1103-04 (quoting, first, *Miller v. Stagner*, 757 F.2d 988, 995 (9th Cir.), *amended on other grounds*, 768 F.2d 1090 (9th Cir. 1985), and, second, *Perry v. Rushen*, 713 F.2d 1447, 1450-51 (9th Cir. 1983)). Thus, the court can apply the Rules of Evidence to exclude evidence, if the court properly balances the interests protected by those Rules against a defendant's competing constitutional interests.

The court summarized matters of relevance and prejudice controlled by Rules 401, 402, 403, and 404(b) of the Federal Rules of Evidence, above. In addition, Rule 609(a) provides, in pertinent part, that "*[f]or the purpose of attacking the character for truthfulness of a witness,*" evidence of a *conviction* of a witness other than the accused for an offense punishable by death or imprisonment in excess of one year is admissible, subject to Rule 403, and evidence that any witness has been *convicted* of a crime involving dishonesty or false statement is admissible, regardless of punishment. FED. R. EVID. 609(a)(1) & (2) (emphasis added). Rule 609 contains one further limitation: convictions more than ten years old (either from the date of conviction or the date of release from custody), are not admissible, "unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect." FED. R. EVID. 609(b); *and compare* FED. R. EVID. 403 (permitting exclusion of evidence if "its probative value is substantially outweighed by the danger of unfair prejudice. . . .").

While Rule 609 applies to prior convictions, Rule 608(b) applies more broadly to "specific instances of the conduct of a witness . . . other than conviction of crimes as provided in rule 609." FED. R. EVID. 608(b). However, like Rule 609, the "specific instances of conduct" to which Rule 608(b) applies must be "for the purpose of attacking or supporting the witness' character for truthfulness." *Id.* Such instances "may not be proved by extrinsic evidence," but "may . . . be inquired into on cross-examination of the

witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified." *Id.*

Applying these rules here, with due regard to any competing constitutional interests the defendants may have, and as to only the specific prior conviction against one confidential source and the prior charge against the other confidential source that the court finds are properly at issue, the prosecution's motion in limine must be granted, at least in part.

b. The conviction for a sex offense

First, as to the conviction of the confidential informant against defendant Norita for attempted oral copulation, that conviction falls within Rule 609, because it is a "conviction," and within the ten-year limitation of Rule 609(b), because the confidential informant began his sentence on that charge in 2001 and, thus, was released from custody within ten years of the present proceedings. FED. R. EVID. 609(b). That conviction falls within the "penalty" limitation of Rule 609(a), because it was punishable by a term of imprisonment in excess of one year. FED. R. EVID. 609(a). What is not clear about the applicability of Rule 609 to evidence of this conviction is whether such evidence would be offered "[f]or the purpose of attacking the character for truthfulness of [the] witness." *Id.* Defendant Sablan apparently asserts that such evidence might be offered for a different purpose, that is, to explore potential bias of the witness against her, or to show motive, opportunity, and so on, to fabricate charges against defendant Sablan or to falsely accuse her of criminal conduct. *See* FED. R. EVID. 404(b) (evidence of other crimes may be admissible as proof of motive, opportunity, intent, etc.).

The court need not decide whether the evidence would otherwise be admissible pursuant to Rule 609 to attack the witness's character for truthfulness. This is so, because

even assuming that it is otherwise admissible pursuant to Rule 609 or, for that matter, Rule 404(b), the ultimate admissibility of the evidence turns on the balance of its probative value against its prejudicial effect. FED. R. EVID. 609(b) (requiring the court to determine whether "the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect"); FED. R. EVID. 403 (permitting exclusion of evidence if "its probative value is substantially outweighed by the danger of unfair prejudice. . . ."); *Cherer*, 513 F.3d at 1157 ("If evidence satisfies Rule 404(b), 'the court must then decide whether the probative value is substantially outweighed by the prejudicial impact under Rule 403.'" (quoting *Romero*, 282 F.3d at 688); *Holler*, 411 F.3d at 1067; *Curtin*, 489 F.3d at 943.

First, as to the probative value side of the probative value versus prejudice equation under these rules, defendant Sablan has not shown any probative value of this conviction, where, at least according to the prosecution, the confidential informant in question was not used against defendant Sablan, but against defendant Norita. Nor has defendant Norita shown any probative value of this conviction, where he simply adopted defendant Sablan's response to this motion in limine, without tailoring it to the conviction in question.

Nevertheless, assuming that any felony conviction has at least some probative value to attack the character of the confidential informant for truthfulness, within the meaning of Rule 609, or some probative value (completely obscure on the present record) related to a purpose permissible under Rule 404(b), the court finds that the prejudicial effect of or danger of unfair prejudice from evidence of the confidential informant's conviction for a *sex offense* outweighs its limited probative value in this case. Evidence of a prior sex offense, in a trial that otherwise has nothing to do with sex offenses, presents "an undue tendency to suggest decision on an improper basis," that is, on the "emotional" basis of dislike of someone who would commit such an offense, without regard to the truth or value

of their testimony, even if it is otherwise corroborated. FED. R. EVID. 403, Advisory Committee Notes (defining "prejudice" as "an undue tendency to suggest decision on an improper basis," such as an "emotional" one).

The balance is considerably different, however, if the prior conviction is merely identified as a "prior felony conviction." Evidence of "a prior felony conviction" retains whatever probative value it has to attack a witness's character for truthfulness, but no countervailing undue prejudicial effect.

Therefore, that part of the prosecution's motion in limine to exclude evidence of the conviction of the confidential informant against defendant Norita for attempted oral copulation will be granted, to the extent that the parties may not refer to this conviction as anything other than "a prior felony conviction," but will otherwise be denied, and evidence of the conviction, so described, will be admissible.

c. The theft charge

The prosecution also seeks to exclude evidence that the confidential source who dealt with defendant Sablan was charged in 2006 with theft and conspiracy to commit theft, but apparently not convicted of that offense. Because this portion of the motion in limine does not involve a conviction, Rule 609 is inapplicable. *See* FED. R. EVID. 609 (pertaining to evidence that a witness has been "convicted"). Thus, the admissibility of the evidence of this charge turns on the application of Rules 608, 404(b), and 403.

The prosecution simply overstates the case when it relies on *United States v. Ripinsky*, 109 F.3d 1436 (9th Cir.), *as amended on denial of rehearing*, 129 F.3d 518 (9th Cir. 1997), to assert that "the law is well settled that using evidence of a prior arrest that did not result in a conviction to impeach a witness is impermissible." *See* Prosecution's Motion *In Limine* To Exclude Prior Criminal Histories Of Confidential Informants (docket no. 115) at 3 & n.3. In *Ripinsky*, the Ninth Circuit Court of Appeals affirmed the district

court's limitation on the cross-examination of a witness to exclude inquiry into his criminal referral, which did not result in a conviction, where the FDIC investigator indicated that there was no evidence, only suspicion, that the witness committed the acts charged in the criminal referral, and the court did not foreclose inquiry into the witness's potential bias or questioning regarding allegations that the witness created false documents. *Ripinsky*, 109 F.3d at 1445. The decision in *Ripinsky* says nothing whatever about whether evidence of arrests is generally admissible; it says only that exclusion of a criminal referral of a witness in that case was not an abuse of discretion, in light of evidence of the dubious validity of the charges against the witness. What *Ripinsky* may reasonably suggest is simply that evidence of *the wrongful conduct* must be adequate to permit introduction of evidence of the resulting arrest, if no conviction followed the arrest. *Cf. United States v. Bryan*, 534 F.2d 205, 206 (9th Cir. 1976) (evidence of an arrest that resulted in acquittal could not have been admitted over an objection, but the party objecting to that evidence on appeal had revealed the fact of the prior arrest to the jury in the first instance); *see also Pulido v. United States*, 425 F.2d 1391, 1393-94 (9th Cir. 1970) (considering when evidence of arrests is permissible to subject *the accused* to an appropriate and searching inquiry into his conduct and predisposition in the face of an entrapment defense).

The court has not found any general prohibition in the Ninth Circuit on evidence of an arrest that did not lead to a conviction. Moreover, Rule 608 is applicable to "instances of the conduct of a witness . . . other than conviction of a crime," and Rule 404(b) applies to "wrongs" and "acts," so that both rules would seem, by their terms, to consider the admissibility of instances of conduct leading to arrests, but not to convictions. *See, e.g., United States v. Gonzalez-Lira*, 936 F.2d 184, 189 (5th Cir. 1991) (Rule 404(b) applies to "wrongs" and "acts" in addition to "crimes," so "there is no requirement that the prior conduct even have resulted in an indictment or a formal charge"). On the other

hand, an arrest, standing alone, is simply an accusation, not evidence of anything, as the court will tell the jury. *See* Ninth Circuit Model Criminal Jury Instruction No. 1.2. To be clear, evidence merely of an arrest is not admissible, but evidence of conduct that led only to an arrest, but not to a conviction, is likely to be admissible, where other requirements are met.

Thus, the first problem with the evidence of the arrest of the confidential informant against defendant Sablan is not that the evidence only relates to an arrest, not a conviction, but that it may not involve sufficient evidence of wrongful conduct. The court has not been apprised that there is any other evidence of the underlying wrongful conduct on which the arrest was based.

There are other problems with this evidence, however. Specifically, assuming that evidence of theft or a conspiracy to commit theft by the confidential informant is probative evidence to attack his character for truthfulness, which might bring it within the scope of Rule 608(b), it certainly is not clear how, and defendant Sablan has not explained how, evidence of this arrest is demonstrative of the confidential informant's motive, opportunity, and so on, to fabricate charges against defendant Sablan or to falsely accuse her of criminal conduct, such that it would come within the scope of Rule 404(b). To the extent this evidence might otherwise be admissible pursuant to Rule 608(b), that Rule bars proving the instance of bad conduct by extrinsic evidence, so that, at best, defendant Sablan would be permitted to inquire into the arrest on cross-examination of the confidential informant. FED. R. EVID. 608(b). Whether to allow such an inquiry, however, is within the court's discretion. *Id.*

That discretion is guided here by Rule 403, which permits the court to exclude probative evidence if its probative value is "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of

undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403. A detour into inquiries about a confidential informant's arrest for theft and conspiracy to commit theft appears to the court, in the circumstances of this case, to present a substantial danger of confusion of the issues, undue delay, and waste of time, as the inquiry may devolve into a minitrial or at least into inquiries and arguments about the circumstances of the arrest, even if the arrest is not itself unduly prejudicial. *Id*. In the absence of a more specific showing that evidence of this confidential informant's arrest for theft and conspiracy to commit theft, or an inquiry into the conduct underlying that arrest, is essential to protect defendant Sablan's confrontation rights or to support her theory of defense, the court finds that evidence of this confidential informant's arrest should be excluded pursuant to Rule 403.

Thus, the portion of the prosecution's motion in limine to exclude evidence of the arrest of the confidential informant against defendant Sablan for theft and conspiracy to commit theft will be granted.

3. Summary

The prosecution's Motion *In Limine* To Exclude Prior Criminal Histories Of Confidential Informants (docket no. 115) will be granted in part and denied in part. The portion of the motion seeking to exclude evidence of the conviction of the confidential informant against defendant Norita for attempted oral copulation will be granted, to the extent that the parties may not refer to this conviction as anything other than "a prior felony conviction," but that part of the motion will otherwise be denied, and evidence of the conviction, so described, will be admissible. The portion of the motion in limine seeking to exclude evidence of the arrest of the confidential informant against defendant Sablan for theft and conspiracy to commit theft will be granted.

III. CONCLUSION

This ruling does not address the prosecution's Motion *In Limine* To Exclude Argument Or Objection re: Recorded Statements (docket no. 113), because that motion has been set for hearing at the pretrial conference. However, it does address the prosecution's other three evidentiary motions, which are resolved as follows:

1. The prosecution's Motion *In Limine* To Exclude Argument Or Questions re: Drug Addiction (docket no. 111) is **denied as moot**, where neither defendant intends to offer an insanity or mental state defense based on addiction;

2. The prosecution's Motion *In Limine* To Preclude Any Mention Of Penalty (docket no. 112) is **granted** to the extent that the court will exclude any comment or argument, evidence or testimony, or question designed to elicit testimony concerning the penalty resulting from a conviction of *the defendants* in this case, but the defendants are free to question any *witness* about the potential penalties that witness may face for participating in crimes charged against the defendants or for any other offenses, in the absence of a substantial assistance motion from the prosecution;

3. The prosecution's Motion *In Limine* To Exclude Prior Criminal Histories Of Confidential Informants (docket no. 115) will be granted in part and denied in part, as follows:

    a. The portion of the motion seeking to exclude evidence of the conviction of the confidential informant against defendant Norita for attempted oral copulation is **granted**, to the extent that the parties may not refer to this conviction as anything other than "a prior felony conviction," but is otherwise **denied**, and evidence of the conviction, so described, will be admissible;

b. The portion of the motion in limine seeking to exclude evidence of the arrest of the confidential informant against defendant Sablan for theft and conspiracy to commit theft is **granted**.

FURTHERMORE, to avoid exposure of potential jurors to information about the matters addressed in this ruling, this ruling shall be sealed until ten days after completion of trial or the guilty pleas of both defendants, unless a party files a motion within that ten-day period showing good cause why the ruling should remain sealed.

IT IS SO ORDERED.

DATED this 7th day of April, 2010.

Mark W. Bennett

MARK W. BENNETT
U. S. DISTRICT COURT JUDGE
NORTHERN DISTRICT OF IOWA
VISITING JUDGE